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AHMAD ZUBAIR HJ MURSHID

v.

PP

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COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: W-09-102-03-2013]
C 1 NOVEMBER 2013

CIVIL PROCEDURE: *Striking out - Application for - Application to set aside and strike off charges against appellant - Charges - Whether flawed and defective - Whether specified direction of law or legal contract*
D *on discharge of trust - Whether fatal - Whether premature for court to decide on issues raised - Whether prosecution precluded from adducing relevant evidence - Whether proper case for court to exercise inherent powers to quash charges - Whether charges mala fide, oppressive and an abuse of court process - Criminal Procedure Code, ss. 51A, 156 & 173*

E

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Inherent powers to set aside and quash charges - Whether court has general power to quash charge where an indictment has been preferred - Whether court could only exercise its inherent powers when there is miscarriage of justice - Whether*
F *charges mala fide, oppressive and an abuse of court process*

The appellant was charged in the Sessions Court with two principal amended charges under s. 409 of the Penal Code ('the Code') and two alternative amended charges under s. 418 of the same. The charges disclosed that the appellant was charged in his
G capacity as the President and Group Chief Executive of Sime Darby Bhd. The charges asserted that the appellant committed criminal breach of trust in dishonestly causing Sime Darby Plantations to make payments amounting to RM16,816,217 and RM85,023,047.20. Before the commencement of the trial at the
H Sessions Court, the appellant took out a notice of motion at the High Court seeking, *inter alia*, that (i) the charges against the appellant under ss. 409 and 418 of the Code be set aside and struck off; and (ii) the appellant to be acquitted and discharged from the charges. The High Court Judge, after hearing the notice
I of motion, dismissed it. Aggrieved by the said decision, the

appellant appealed to this court. The issues that arose for consideration were (i) whether the charges were flawed for the reason that the charges did not specify the direction of law prescribing the manner in which the trust was to be discharged or of any legal contract made touching on the discharge of the trust; and (ii) whether the charges against the appellant were groundless, *mala fide* and an abuse of the court process.

Held (dismissing appeal; affirming decision of the High Court)

Per Azahar Mohamed JCA delivering the judgment of the court:

(1) The High Court has the inherent jurisdiction to set aside and quash a charge which is oppressive and an abuse of the process of the court. The court will only exercise its inherent power when there is miscarriage of justice. However, a court has no general power to quash the charge and to decline to allow the trial to proceed where an indictment has been preferred in accordance with the law. (para 4)

(2) The omission to state the mode in which the trust was to be discharged or of any legal contract made touching on the trust was not fatal at this stage of the proceedings. During the course of the trial, the prosecution can amend and lead evidence to identify the breach. With the leave of the court, the prosecution is entitled to amend the charges at any stage of the trial (*PP v. Yeoh Teck Chye*; refd). (para 7)

(3) Section 156 of the Criminal Procedure Code ('CPC') provides that no error in stating either the offence or the particulars be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the appellant was in fact misled by that error or omission. However, whether such error or omission had occasioned a failure of justice could only be determined at the conclusion of the trial having regard to the entire evidence being placed before the trial judge. (para 8)

(4) Based purely on the documents supplied by the prosecution to the appellant pursuant to s. 51A of the CPC, it was premature at this early stage of the proceedings for the court to decide on the issues raised. Documentary evidence must be viewed in the light of the case as a whole and it would be

wrong for the court to consider these documents in isolation. The trial against the appellant in the Sessions Court was regulated by s. 173 of the CPC. Evidence could be led to establish the case of the prosecution on a *prima facie* basis and subsequently beyond reasonable doubt. Since the appellant had pleaded not guilty to the charges, in accordance with s. 173(c) of the CPC, the Sessions Court shall proceed to take all such evidence as may be produced in support of the prosecution. (para 10)

(5) The appellant was entrusted with dominion over the funds of the company to acquire native customary rights ('NCR') lands under the Sarawak Upstream Expansion Plan. In regards to the offence of cheating under s. 418 of the Code, the two charges asserted that the appellant had cheated the Board of Directors of Sime Darby Bhd by omitting to inform the said board that the NCR lands approved to Sime Darby had instead been awarded to other parties. It was premature at this stage to preclude the prosecution from adducing admissible and relevant evidence during the trial through the witnesses that these relevant facts should have been brought to the knowledge of the Board of Directors of Sime Darby at any time. For the purposes of the trial, the prosecution would not only depend on the documentary evidence but equally *viva voce* evidence to establish its case. (paras 5, 11 & 13)

(6) This was not a proper case for the court to exercise its inherent powers to set aside and quash the charges against the appellant. The appellant had not established that the charges against him were *mala fide*, oppressive and an abuse of the process of the court. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh di Mahkamah Sesyen dengan dua pertuduhan utama terpinda di bawah s. 409 Kanun Keseksaan ('Kanun') dan dua pertuduhan terpinda alternatif di bawah s. 418 Kanun. Pertuduhan menunjukkan bahawa perayu telah didakwa dalam kapasitinya sebagai Presiden dan Ketua Eksekutif Kumpulan Sime Darby Bhd. Pertuduhan menegaskan bahawa perayu telah melakukan pecah amanah jenayah kerana dengan tidak jujur telah menyebabkan Sime Darby Plantations untuk membuat bayaran sebanyak RM16,816,217 dan RM85,023,047.20. Sebelum permulaan perbicaraan di Mahkamah Sesyen, perayu telah

mengeluarkan satu notis usul di Mahkamah Tinggi memohon, antara lain; bahawa (i) pertuduhan terhadap perayu di bawah ss. 409 dan 418 Kanun diketepikan dan dibatalkan; dan (ii) perayu dibebaskan dan dilepaskan daripada pertuduhan-pertuduhan tersebut. Hakim Mahkamah Tinggi, selepas mendengar notis usul tersebut, telah menolaknya. Terkilan dengan keputusan tersebut, perayu merayu ke mahkamah ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada pertuduhan adalah cacat atas alasan bahawa pertuduhan tidak menyatakan arahan dari segi undang-undang yang menentukan cara amanah itu harus dilaksanakan atau kontrak sah yang dibuat yang menyentuh berkenaan pelaksanaan amanah; dan (ii) sama ada pertuduhan terhadap perayu adalah tidak berasas, *mala fide* dan suatu penyalahgunaan proses mahkamah.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi mempunyai bidang kuasa sedia ada untuk mengenepikan atau membatalkan pertuduhan yang menindas atau menyalahgunakan proses mahkamah. Mahkamah hanya akan melaksanakan kuasa sedia ada itu apabila terdapat ketidakadilan. Walau bagaimanapun, mahkamah tidak mempunyai kuasa umum untuk membatalkan pertuduhan dan menolak kebenaran bagi meneruskan perbicaraan di mana satu pendakwaan telah dilakukan mengikut undang-undang.

(2) Peninggalan untuk menyatakan cara bagaimana amanah dilaksanakan atau sebarang kontrak sah yang dibuat menyentuh terhadap amanah bukannya tidak dapat dipulihkan pada peringkat prosiding ini. Semasa perbicaraan, pihak pendakwaan boleh membuat pindaan dan mengemukakan keterangan untuk mengenal pasti pelanggaran. Dengan kebenaran mahkamah, pihak pendakwaan berhak untuk meminda pertuduhan pada mana-mana peringkat perbicaraan (*PP v. Yeoh Teck Chye*; dirujuk).

(3) Seksyen 156 Kanun Tatacara Jenayah ('KTJ') memperuntukkan bahawa kesilapan dalam menyatakan kesalahan atau butir-butir yang perlu dinyatakan dalam pertuduhan dan peninggalan untuk menyatakan kesalahan atau butir-butir tersebut tidak

akan dipertimbangkan pada mana-mana peringkat kes sebagai penting, melainkan perayu telah dikelirukan oleh kesalahan atau peninggalan tersebut. Walau bagaimanapun, sama ada kesalahan atau peninggalan itu telah menyebabkan satu ketidakadilan hanya boleh ditentukan pada penutupan perbicaraan dengan mengambil kira keseluruhan keterangan yang dikemukakan di hadapan hakim bicara.

(4) Berdasarkan dokumen-dokumen yang telah dibekalkan oleh pihak pendakwaan kepada perayu di bawah s. 51A KTJ, adalah pramatang pada peringkat awal prosiding ini untuk mahkamah memutuskan isu-isu yang telah dibangkitkan. Keterangan dokumentar harus dilihat berdasarkan kes secara keseluruhan dan adalah salah untuk mahkamah mempertimbangkan dokumen-dokumen ini secara terperinci. Perbicaraan terhadap perayu di Mahkamah Sesyen dilaraskan oleh s. 173 KTJ. Keterangan boleh dikemukakan untuk membuktikan kes pihak pendakwaan atas dasar *prima facie* dan kemudian melampaui keraguan munasabah. Oleh kerana perayu tidak mengaku salah kepada pertuduhan, sejajar dengan s. 173(c) KTJ, Mahkamah Sesyen harus meneruskan mengambil segala keterangan yang telah dikemukakan bagi menyokong pihak pendakwaan.

(5) Perayu telah diamanahkan dengan kuasa terhadap dana syarikat untuk memperolehi hak tanah adat di bawah Sarawak Upstream Expansion Plan. Berkenaan kesalahan penipuan di bawah s. 418 Kanun, kedua-dua pertuduhan telah menegaskan bahawa perayu telah menipu Lembaga Pengarah Sime Darby Sdn Bhd dengan tidak memberitahu lembaga tersebut bahawa tanah-tanah tersebut yang telah diluluskan kepada Sime Darby sebaliknya telah diberikan kepada pihak-pihak lain. Adalah pramatang di peringkat ini untuk menghalang pihak pendakwaan daripada mengemukakan keterangan relevan dan boleh diterima semasa perbicaraan melalui saksi-saksi bahawa fakta-fakta relevan ini harus dimaklumkan kepada Lembaga Pengarah Sime Darby pada bila-bila masa. Bagi maksud perbicaraan, pihak pendakwaan tidak hanya bergantung kepada keterangan dokumentar tetapi keterangan *viva voce* untuk membuktikan kesnya.

(6) Kes ini bukan kes yang sesuai bagi mahkamah melaksanakan kuasa sedia ada untuk mengenepikan dan membatalkan pertuduhan-pertuduhan terhadap perayu. Perayu gagal membuktikan bahawa pertuduhan-pertuduhan terhadapnya adalah *mala fide*, menindas dan adalah satu penyalahgunaan proses mahkamah.

Case(s) referred to:
Connelly v. Director of Public Prosecutions [1964] 2 All ER 401 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 8 CLJ 934 CA ***(refd)***
Director of Public Prosecutions v. Humphreys [1976] 2 All ER 497 ***(refd)***
Francis Dang Anak Nuya v. PP [1988] 1 LNS 32 CA ***(refd)***
Karpal Singh & Anor v. Public Prosecutor [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
PP v. Heng You Nang [1949] 1 LNS 61 HC ***(refd)***
PP v. Ini Abong & Ors [2009] 1 CLJ 526 HC ***(refd)***
PP v. Tan Kim Kang & Ors [1962] 1 LNS 137 HC ***(refd)***
PP v. Yeoh Teck Chye and Lim Hong Pung & Anor v. PP [1981] 1 LNS 93 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51A, 156, 158, 159, 160, 161, 162, 173(h)(ii), 422
Penal Code, ss. 409, 418

Other source(s) referred to:
Archbold 2007: Criminal Pleading, Evidence and Practice, p 358

For the appellant - Mohd Yusof Zainal Abiden (Stanley C Augustin, Devanandan S Subramaniam, Lim Kon Keen & Kamarul Hisham Kamaruddin with him); M/s Stanley Augustin & Co
For the respondent - Kevin Morais (Muhammad Saifuddin Hashim Musaimi with him); DPPs

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 44-225-12 2012]

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JCA:

[1] On 17 July 2012, Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid ('the appellant') was charged in the Sessions Court at Kuala Lumpur with two principal amended charges under

A s. 409 of the Penal Code ('the Code') (case No: 62-563-07/2012) and two alternative amended charges under s. 418 of the same Code (case No: 62-564-07/2012).

[2] Subsequently, before the commencement of the trial at the
B Sessions Court, the appellant took out a notice of motion dated 2 January 2013 at the Kuala Lumpur High Court seeking the following orders:

(i) The charges against the appellant under ss. 409 and 418 of the PC in cases No: 62-563-07/2012 and 62-564-07/2012 to
C be set aside and struck off;

(ii) The applicant to be acquitted and discharged from the charges;

D (iii) The proceeding of these two cases be suspended and/or stayed pending the disposal of this application; and

(iv) Any relief or direction or further order deemed fit and appropriate.

E **[3]** On 15 March 2013 after hearing the notice of motion, the learned High Court Judge dismissed it. Aggrieved by that decision, the appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously dismissed it. We now give our reasons for so deciding.

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[4] There can be no doubt that the High Court has the inherent jurisdiction to set aside and quash a charge which is oppressive and an abuse of the process of the court (see: *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401, *Director of*
G *Public Prosecutions v. Humphreys* [1976] 2 All ER 497, *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; [1991] 2 MLJ 544 and *Dato' Seri Anwar Ibrahim v. PP* [2010] 8 CLJ 934; [2010] 6 MLJ 533). The court will only exercise its inherent power when there is miscarriage of justice (see: *Karpal Singh &*
H *Anor v. PP* (*supra*) and *PP v. Ini Abong & Ors* [2009] 1 CLJ 526; [2008] 8 MLJ 106). The jurisdiction to stay proceedings on the basis of abuse of process is to be exercised with greatest caution; the fact that a prosecution is ill advised or unwise is no basis for its exercise (see: *Archbold 2007: Criminal Pleading, Evidence and*
I *Practice*, p. 358). A court has no general power to quash the charge and to decline to allow the trial to proceed where an indictment has been preferred in accordance with the law (see: *Director of Public Prosecutions v. Humphrys* (*supra*)).

[5] From these introductory general principles, we now turn to the issues raised in this appeal before us. First, we shall deal with the first and second principal amended charges against the appellant in relation to an offence of criminal breach of trust by an agent under s. 409 of the Code. We have read in detail the amended principal charges as can be seen at pp. 91-92 of the appeal record. We noted that the charges disclosed that the appellant was charged in his capacity as President and Group Chief Executive of Sime Darby Bhd. The amended charges then go on to specify that in such capacity, the appellant was entrusted with dominion over the funds of the company to acquire Native Customary Rights ('NCR') lands under the Sarawak Upstream Expansion Plan. The charges then asserted that the appellant committed criminal breach of trust in dishonestly causing Sime Darby Plantations, a subsidiary of Sime Darby to make payments amounting to RM16,816,217 and RM85,023,047.20 respectively in having to acquire Nature Ambience Sdn Bhd and Vertical Drive Sdn Bhd.

[6] Datuk Mohd Yusof bin Zainal Abiden, learned counsel for the appellant argued that the amended criminal breach of trust charges were flawed, defective and tantamount to the appellant being charged for an offence unknown to the Code for the reasons that the charges did not specify the direction of law prescribing the manner in which the trust was to be discharged or of any legal contract made touching on the discharge of the trust.

[7] With respect, we are unable to agree with the contention of learned counsel for the appellant. In our view, the omission to state the mode in which the trust is to be discharged or of any legal contract made touching of the trust is not fatal at this stage of the proceedings. We agree with the submissions of Encik Kevin Morais, learned Deputy Public Prosecutor ('DPP') to the effect that the prosecution during the course of the trial can amend and lead evidence to identify the breach. In this regard, it is an established principle that with the leave of the court, the prosecution is entitled to amend the charges at any stage of the trial (see: *PP v. Heng You Nang* [1949] 1 LNS 61; [1949] MLJ 285, *Francis Dang Anak Nuya v. PP* [1988] 1 LNS 32; [1988] 1 MLJ 89, *PP v. Tan Kim Kang & Ors* [1962] 1 LNS 137; [1962] MLJ 388). The rules governing amendment of charges are provided for

in ss. 158 to 162 and in s. 173(h)(ii) of the Criminal Procedure Code ("the CPC"). The case of *PP v. Yeoh Teck Chye and Lim Hong Pung & Anor v. PP* [1981] 1 LNS 93; [1981] 2 MLJ 176 demonstrates that in the course of the trial, the prosecution is entitled to amend the criminal breach of trust charges.

[8] Furthermore, s. 156 of the CPC provides that no error in stating either the offence or the particulars to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the appellant was in fact misled by that error or omission. More than that, s. 422 of the CPC provides that any error or omission in the charges would not vitiate the proceedings, unless such error or omission has occasioned a failure of justice. In our view, whether the appellant was misled by any error or omission in the charges or whether such error or omission has occasioned a failure of justice can only be determined at the conclusion of the trial having regard to the entire evidence being placed before the trial judge.

[9] Learned counsel for the appellant also raised the following issues to support his contention that the principal amended charges against the appellant were groundless, *mala fide* and an abuse of the court process. First, the appellant was entrusted with the funds of Sime Darby Bhd to obtain NCR lands but the eventual payments were made from Sime Darby Plantations in which the appellant had no connection with the dominion of the funds. Secondly, the appellant was not responsible for the approval and eventual payments made by Sime Darby Plantations to purchase Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd. And thirdly, the acquisition of Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd were made pursuant to a resolution approved by the Board of Directors of Sime Darby Bhd on 11 September 2008.

[10] In our view, based purely on the documents that have been supplied by the prosecution to the appellant pursuant to s. 51A of the CPC, it is premature at this early stage of the proceedings for the court to decide on the three issues raised by learned counsel. Documentary evidence must be viewed in the light of the case as a whole and it would be wrong for the court to consider these documents in isolation. The prosecution is entitled to produce these documents during the trial through its relevant

witnesses in order to unravel the case for the prosecution in its proper context. The prosecution is entitled to explain through its relevant witnesses, within the limits of the relevant provisions of the Evidence Act 1950, how these documents came into existence and how these documents fit into the prosecution's case. When the case for the prosecution is concluded, after the prosecution has examined its witnesses, who may in turn be cross-examined and if necessary re-examined, only then the court shall consider based on the entire evidence whether the prosecution has made out a *prima facie* case against the appellant. For the proper determination of the issues raised by learned counsel, it must be pointed out that the trial against the appellant in the Sessions Court is regulated by s. 173 of the CPC. Evidence could be led to establish the case of the prosecution on a *prima facie* basis and subsequently beyond reasonable doubt. Since the appellant had pleaded not guilty to the charges, in accordance with s. 173(c) of the CPC, the Sessions Court shall proceed to take all such evidence as may be produced in support of the prosecution.

[11] We turn next to the first and second alternative amended charges, which can be seen at pp. 87-88 of the appeal record. These are charges relating to an offence of cheating under s. 418 of the Code. In substance, the two charges asserted that the appellant had cheated the Board of Directors of Sime Darby Bhd by omitting to inform the said board that the NCR lands approved to Sime Darby Bhd had instead been awarded to Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd. We are of the view that a plain reading of these amended cheating charges clearly indicate the offences with which the appellant were charged and they contained sufficient particulars which the prosecution intended to prove against the appellant.

[12] Regarding the alleged defect of these charges, it is the contention of learned counsel for the appellant that the Board of Directors of Sime Darby Bhd did not meet to discuss the acquisition of the two companies on the dates specified in both the alternative charges. It was therefore argued that there was no omission on the part of the appellant to inform the Board of Directors of Sime Darby Bhd that the NCR lands approved to Sime Darby Bhd had instead been awarded to Vertical Drive Sdn Bhd and Nature Ambience Sdn Bhd.

A **[13]** With respect we are also unable to accede to this contention. In this regard, we find there is merit in the arguments of the learned DPP that the prosecution is entitled to adduce evidence during the trial that the omission as stated in the cheating charges was not in relation to the Board of Directors of
B Sime Darby Bhd. It is premature at this stage to preclude the prosecution from adducing admissible and relevant evidence during the trial through witnesses that these relevant facts should have been brought to the knowledge of the Board of Directors of Sime Darby Bhd at any time and not necessarily at the Board of
C Director meeting. As emphasised by learned DPP for the purposes of the trial the prosecution would not only depend on the documentary evidence but equally *viva voce* evidence to establish its case.

D **[14]** For all these reasons, we are of the view that this is not a fit and proper case for the court to exercise its inherent powers to set aside and quash the charges against the appellant. The appellant had not established that the charges against him were *mala fide*, oppressive and an abuse of the process of the court.
E We had accordingly dismissed the appeal. We hereby affirm the decision of the learned High Court Judge.

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